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Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0012

Re: ***National Railroad Passenger Corporation – Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*** **(Docket No. NOR 42134)**

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding please find CN's Response to Amtrak's Reply to CN's Motion to Dismiss or, in the Alternative, to Stay.

Yours truly,

David A. Hirsh

Enclosure
cc: All Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. NOR 42134

NATIONAL RAILROAD PASSENGER CORPORATION –
SECTION 213 INVESTIGATION OF SUBSTANDARD PERFORMANCE
ON RAIL LINES OF CANADIAN NATIONAL RAILWAY COMPANY

CN'S RESPONSE TO AMTRAK'S REPLY TO CN'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY

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BEFORE THE
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Docket No. NOR 42134

NATIONAL RAILROAD PASSENGER CORPORATION –
SECTION 213 INVESTIGATION OF SUBSTANDARD PERFORMANCE
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CN'S RESPONSE TO AMTRAK'S REPLY TO CN'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY

Amtrak's reply to CN's motion to dismiss explains for the first time how Amtrak reads Section 213 of PRIIA and how and by whom it proposes that "on-time performance" ("OTP") be defined. Amtrak also makes new arguments that the Board supposedly disfavors all motions to dismiss, that CN has waived a response to Amtrak's proposed amended complaint even before the Board rules on Amtrak's motion for leave to file the complaint, and, in a reversal of position, that the Board lacks authority to stay this proceeding. CN respectfully requests leave to file this response to Amtrak's reply in order to address Amtrak's new positions.[1]

I. Undisputed Points

Amtrak's reply clarifies that there is no dispute as to the following:

1) The only potential basis for this proceeding is under Section 213 of PRIIA, on the premise that "the on-time performance of [the Illini/Saluki service] averages less than 80 percent

[1] Given the importance of the threshold issues in this first proceeding under Section 213 and given Amtrak's new positions, there is good cause here to waive 49 C.F.R. § 1104.13(c), which generally prohibits replies to a reply. *Cf. Cal. High Speed Rail Auth. – Constr. Exemption – In Fresno, Kings, Tulare, & Kern Cntys., Cal.*, Docket No. FD 35724 (Sub-No. 1), slip op. at 8 (STB served Aug. 12, 2014); *El Expreso Grp. – Asset Acquisition – CUSA EE, LLC*, Docket No. MCF 21048, slip op. at 2 n.3 (STB served Sept. 7, 2012).

for any 2 consecutive calendar quarters," 49 U.S.C. § 24308(f)(1). *See* Amtrak Reply at 11 (conceding that Amtrak has no alternative basis for this proceeding).

2) To proceed on that basis, OTP must be defined for purposes of Section 213; otherwise there is no yardstick to determine if there is a basis to proceed. But OTP is not defined "in Section 213" (*id.* at 9; *accord, id.* at 5), or in any other statutory provision.[2] Nor is OTP self-defining. *See* CN Mot. at 11-12 & n.11.[3]

3) PRIIA provides that OTP is to be jointly defined by the FRA and Amtrak under Section 207(a). In light of the D.C. Circuit's decision, however, Amtrak cannot rely on the Section 207(a) metrics and standards (*see* Amtrak Reply at 4), and now states that it does not rely on the definition of OTP in those "presently null and void" standards (*id.* at 10 n.8).

II. Amtrak's New Interpretation of the Statute and OTP

Until the Section 207(a) rulemaking was held unconstitutional, Amtrak relied on the definition of OTP contained in the Section 207(a) metrics as the basis for triggering Section 213. Amtrak (i) never attempted to bring a Section 213 proceeding regarding train performance before the metrics and standards were promulgated; (ii) in the 2010 metrics and standards, equated the

[2] Amtrak cites a 38-year-old statutory performance goal and a repealed ICC regulation, *id.* at 9-10, but neither uses the phrase "on-time performance," and neither is incorporated or referenced in PRIIA.

[3] Amtrak's reply reinforces CN's point that many definitions of OTP are possible. Amtrak cites what it calls "definition[s] of on-time performance" that have 5-minute, 10-minute, and 2-hour tolerances (Amtrak Reply at 6), while also relying on non-definitional provisions that call for timeliness within a 15-minute tolerance "to the maximum extent feasible," or within 5 minutes per 100 miles insofar as "within a carrier's control" (*id.* at 9-10). Some of those formulations address arrival times at stations and connections; others do so only at the endpoint of the route. In addition, Amtrak and CN agreed to a different OTP metric in their operating agreements (under which CN consistently scores above 80%). *See* CN Mot. at 4 & n.6, 6, 11 n.11.

Section 207(a) definition of "Endpoint OTP" with the OTP trigger in Section 213;[4] and (iii) in its original complaint against CN in January 2012, (a) claimed "substandard on-time performance ('OTP')" based expressly and exclusively on the Section 207(a) OTP metrics,[5] and (b) stated that "[t]he Section 207 standards define trains as 'on-time'" for Section 213 purposes.[6] Even in its proposed amended complaint, Amtrak defined OTP, without stating the basis for its definition, in a manner fully consistent with the Section 207(a) metrics.[7] And prior to its reply to CN's motion to dismiss Amtrak never requested or suggested that the Board could or should define OTP for purposes of Section 213.

Amtrak's reply concedes that it cannot rely on the "presently null and void" Section 207(a) metrics. Amtrak Reply at 10 n.8; *see also id.* at 4. Instead, in a reversal of its prior position, Amtrak now claims that the meaning of "on-time performance" in Section 213 is a matter for ***the Board*** to "construe" in its "discretion." *See id.* at 5, 7. Amtrak claims that the Board should have "discretion" to define OTP under PRIIA because (i) the Board has previously

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[4] *See* FRA, Metrics and Standards for Intercity Rail Passenger Service (May 12, 2010), Dkt. No. FRA-2009-0016, at 17, *available at* http://www.fra.dot.gov/ELib/Details/L02875 (inserting "[i.e., Endpoint OTP]" in a quotation from Section 213).

[5] Complaint ¶2; *see, e.g., id.* ¶¶ 16, 20, 23, 24 (relying on the metrics and standards definitions).

[6] *Id.* ¶ 30.

[7] *See* CN Mot. at 9-10. Amtrak now says that the definition of OTP it intended to use in its proposed amended complaint differs from the one it jointly promulgated with the FRA in the Section 207(a) metrics because, "e.g., they have a uniform 15-minute grace period for on-time station stop measurement and there is no change in 'effective speed' measurement." Amtrak Reply at 10 n.8. And Amtrak derides CN's motion as "not responsive to the Amended Complaint" insofar as CN assumed that Amtrak was relying on the Section 207(a) metrics. *Id.* at 9 n.6. But Amtrak gave no indication in the proposed amended complaint that it was relying on a different definition. The terms "uniform" and "effective speed" appear nowhere in Amtrak's motion to amend or in its proposed amended complaint, and 15 minutes would be the tolerance applicable to the Illini/Saluki service under the Section 207(a) metrics (based on route mileage).

addressed issues of timeliness and explained what it meant by OTP in its own regulations and rulings – albeit adopting various, conflicting definitions, and albeit that the Board has apparently never been asked to give meaning to "on-time performance" when used in a statute, *id.* at 5-6; (ii) Congress has a longstanding "policy focus" on OTP (which is irrelevant to who should define it), *id.* at 7; and (iii) the Board has construed other statutory terms, *id*. And Amtrak now asks the Board to define OTP in a manner that, Amtrak says, "differ[s] . . . in several respects" from the definition of OTP Amtrak itself promulgated with the FRA under Section 207(a). *See id.* at 10 n.8, 11.

Congress could have chosen to assign to the Board the task of defining OTP. But it made a different choice. Congress expressly instructed ***the FRA and Amtrak*** to define OTP for PRIIA purposes, including for purposes of triggering investigations under Section 213. *See* Section 207(a) ("the Federal Railroad Administration and Amtrak shall jointly . . . develop new or improve existing metrics . . . for measuring . . . on-time performance," which "shall include . . . measures of on-time performance"). Basic principles of statutory interpretation counsel that when Congress expressly assigns a task to one regulator, it does not intend a different regulator to perform the same task under the same statute,[8] and that when Congress uses the same term in

[8] *See, e.g., Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) ("A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' This principle of statutory construction reflects an ancient maxim – *expressio unius est exclusio alterius*.") (citation omitted). Amtrak cannot evade this principle by saying that it merely wants the Board to "construe" OTP in Section 213. *See* Amtrak Reply at 5-7. Whether labeled "defining" or "construing," regulatory "discretion" to supply meaning to statutory terms exists only insofar as Congress has expressly or impliedly delegated authority to do so, and when Congress expressly provides that meaning will be supplied by a particular regulator through a particular process, it does not impliedly delegate "discretion" to a different regulator to perform the same function. *See, e.g., Adams Fruit Co. v.*

two complementary provisions of the same statute, it does not intend it to be defined by different people, through different processes, in different ways.[9] More simply, common sense counsels that Congress cannot have intended that a single statutory term, OTP, be defined for the same statute both by rule by the FRA and Amtrak and, separately – and, as Amtrak now urges, inconsistently – by the Board.

While claiming that CN "ignore[s] the plain language" of Section 213 of PRIIA (which CN quoted and addressed), Amtrak Reply at 3, Amtrak does not even acknowledge the plain language of Section 207(a) instructing the FRA and Amtrak to define OTP. Literally "ignoring" that language, Amtrak reads Section 213 out of context and argues that Section 213 is "disjunctive," with "80% on-time performance" serving as one free-standing trigger for the Board's jurisdiction, and the metrics and standards serving as a wholly unrelated trigger. *See id.* at 3, 4-5, 7-9.

Amtrak misinterprets Section 213. The function of the "or" between "on-time performance" and "service quality of intercity passenger train operations for which minimum standards are established under section 207" is not, as Amtrak claims, to dissociate OTP from the establishment of metrics under Section 207(a), which Congress instructed should include OTP. Rather, the "or" in Section 213 parallels the "and" in Section 207(a), which instructed the FRA and Amtrak to "develop new or improve existing metrics and minimum standards for measuring

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Barrett, 494 U.S. 638, 649 (1990) (where Congress has established a separate mechanism for making a particular decision, the "congressional delegation of administrative authority" necessary to empower a regulatory agency to authoritatively construe statutory terms cannot be implied).

[9] *See, e.g.*, *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) ("we presume that the same term has the same meaning when it occurs here and there in a single statute").

the performance ***and*** service quality of intercity passenger train operations." Congress intended both Section 207(a) and Section 213 to address (i) "performance" metrics and standards, including OTP, and (ii) independent "service quality" metrics and standards, thus creating complementary triggers. But nothing suggests that Congress intended different regulators to establish different definitions of the single statutory term, "on-time performance."[10]

In sum, Amtrak's new statutory interpretation rests on the premise that the Board should perform a task – defining OTP for PRIIA purposes – Congress expressly assigned to someone else. The Board should abide by the statutory scheme and dismiss this proceeding.[11]

III. Amtrak's Other New Arguments

Amtrak makes three additional new arguments. Each lacks merit:

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[10] Section 213 attaches the qualifier "for which minimum standards are established under section 207" to "service quality" metrics and standards. Doing so was necessary as a trigger requires minimum standards and Congress did not know for which "service quality" metrics the FRA and Amtrak would establish "minimum standards" under Section 207(a). By contrast, Congress established the minimum standard (80%) for the OTP trigger and specifically mandated that the FRA and Amtrak promulgate the metric for OTP, so Congress in Section 213 was able to refer to OTP by name.

[11] If Congress had assigned the task to the Board, further issues would arise. Amtrak apparently would have the Board adopt "Amtrak's on-time performance measurements." Amtrak Reply at 11. Rubber-stamping Amtrak's belatedly proposed definition would deny CN and other interested parties the right to comment on the meaning of OTP for Section 213 purposes, an important question of first impression that would determine the Board's jurisdiction and raise controversial policy issues. For example, Amtrak's claim that its now-preferred definition is better than the contractual definition it agreed upon with CN because a nationally uniform definition should be adopted (*id.* at 11 n.9) ignores the possibility of fashioning a nationally uniform definition that reflects some of the sensible ideas that Amtrak endorsed contractually, such as excluding weather-caused delays. Congress instructed the FRA and Amtrak to define OTP after "consultation with the [Board], rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate." Section 207(a). Congress cannot have intended the Board to define OTP (if it intended the Board to define it at all) without a similar process.

1) Amtrak claims that motions to dismiss are "disfavored." Amtrak Reply at 3. That is true only to the extent that motions to dismiss should not be granted in circumstances where facts may later be developed or pled that provide a basis for proceeding. It is not true in this case, which presents the purely legal question of whether, after the D.C. Circuit's decision, the Board has authority to conduct an investigation under Section 213.[12]

2) Amtrak claims that if and when this proceeding goes forward, CN should be deemed to have "waived" its right to answer Amtrak's proposed amended complaint. Amtrak Reply at 3 n.3. Amtrak's waiver claim is frivolous. Amtrak's motion for leave to file its proposed amended complaint is still pending. If and when the Board grants that motion, CN will be entitled to 20 days to answer the amended complaint. *See* 49 C.F.R. § 1111.4(c). Moreover, CN waived nothing: CN timely requested the opportunity to respond, if necessary, after the motion to dismiss is resolved, *see* CN Mot. at 1 n.2.

3) Amtrak does not rebut CN's showing that a stay pending the Supreme Court's decision would make good practical sense if the Board decides not to dismiss at this time (*id*. at 13-14). Amtrak instead claims, without supporting authority, that the Board "does not have discretion to stay the proceeding." Amtrak Reply at 12. That contradicts Amtrak's prior position. From mid-2013 to mid-2014, Amtrak joined CN in successfully moving the Board to

[12] *See, e.g., DHX, Inc. v. Matson Nav. Co.*, STB Docket No. WCC-105, slip op. at 5 (STB served May 14, 2003) ("a complaint will be dismissed if there are no material issues of fact to be resolved in the proceeding"); *ZoneSkip, Inc. v. United Parcel Serv., Inc.*, 8 I.C.C.2d 645, 651 (June 26, 1992) (dismissing a proceeding rather than "going through discovery and protracted proceedings in order to permit [the complainant] to pursue legal claims that will inevitably prove fruitless"), *aff'd mem. sub nom. ZoneSkip, Inc. v. United States*, 998 F.2d 1007 (3d Cir. 1993). No "disfavor" attaches to the dismissal of a complaint that the tribunal lacks jurisdiction to hear. *See, e.g., Rogers v. Wesco Props., LLC*, 2010 U.S. Dist. Lexis 82523, *6 (D. Ariz. Aug. 4, 2010) ("Plaintiffs claim that 'all motions to dismiss must be viewed with disfavor.' On a Rule 12(b)(1) motion to dismiss, the court presumes it lacks subject matter jurisdiction until the plaintiff can prove otherwise.") (citations omitted).

stay this proceeding, for the express purpose (among others) of awaiting "final resolution of the constitutionality of Section 207(a)." *See, e.g.,* Third Jt. Status Rep. at 1 (May 19, 2014). Amtrak's new position is wrong, and the Board's stay was not unlawful. A duty to investigate (if one exists) does not determine how the investigation is to be conducted. It is within the Board's authority to stay its proceedings pending important developments that may clarify the applicable law. *See, e.g., W. Coal Traffic League v. STB*, 216 F.3d 1168 (D.C. Cir. 2000) (approving as within the Board's discretion a moratorium on processing merger applications while the Board revised the applicable standards by rulemaking, even under a statute that (unlike PRIIA) specified a 180-day deadline for Board decisions).

CONCLUSION

CN's motion to dismiss or, in the alternative, to stay, should be granted.

Respectfully submitted,

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October 14, 2014

CERTIFICATE OF SERVICE

I certify that I have this 14th day of October, 2014, served copies of CN'S Response to Amtrak's Reply to CN's Motion to Dismiss or, in the Alternative, to Stay upon all parties of record in this proceeding by first-class mail or a more expeditious method.

Spencer R. Leroux